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## Disputas relativas à arte e métodos de ADR

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### Abstract

The shortcomings of the traditional court system have highlighted the need for alternative means to solve art-related disputes. The purpose of this article is to analyse the benefits of ADR methods when applied to the resolution of these kind of conflicts, especially in light of the growing international consensus on the subject, as emphasized by the many ADR institutions which have developed a specific area of focus for art-related disputes. Among the various advantages, the flexibility of the procedure, the international and neutral forum, especially suited for disputes involving parties from different countries and cultural backgrounds, the confidentiality guaranteed to the parties, the potentially lower costs and the possibility to tailor creative solutions that can incorporate legal, cultural and ethical interests. Mediation and negotiation are very popular resolution processes, whereby the parties remain in full control of the procedure. However due to their voluntary nature, a final result cannot be guaranteed. In this sense, arbitration can be regarded as a highly recommended alternative to litigation. While still grounded upon the parties' consent, it always culminates with a final and binding decision which could be effectively enforced almost worldwide on the basis of the 1958 New York Convention.

**Keywords:** Art-related disputes. ADR methods. Flexibility. International and neutral forum. Privacy. Creative solutions.

### Resumo

As deficiências do sistema judiciário tradicional destacaram a necessidade de meios alternativos para resolver disputas relacionadas à arte. O objetivo deste artigo é analisar os benefícios dos métodos de ADR quando aplicados na resolução deste tipo de disputas, especialmente à luz do crescente consenso internacional sobre o assunto, conforme enfatizado pelas diversas instituições de ADR que desenvolveram uma área específica de foco para disputas relacionadas à arte. Entre as várias vantagens, a flexibilidade do procedimento, o fórum internacional e neutro especialmente adequado para disputas envolvendo partes de diferentes países e origens culturais, a confidencialidade garantida às partes, os custos potencialmente mais baixos e a possibilidade de soluções criativas sob medida que podem incorporar interesses legais, culturais e éticos. A mediação e a negociação são processos de resolução muito populares, nos quais as partes mantêm o controle total do procedi-

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mento. No entanto, devido à sua natureza voluntária, um resultado final não pode ser garantido. Nesse sentido, a arbitragem pode ser considerada uma alternativa altamente recomendada ao contencioso. Embora ainda baseado no consentimento das partes, sempre culmina com uma decisão final e vinculativa que poderia ser aplicada de forma eficaz em quase todo o mundo com base na Convenção de Nova York de 1958.

**Palavras-chave:** disputas relativas à arte, métodos de ADR, flexibilidade, fórum internacional e neutro, privacidade, soluções creativas

## 1 Alternative Dispute Resolution methods and art-related disputes.

As disputes, in the art and cultural heritage field, become more transnational, complex and more widespread, the need to find a suitable forum for their resolution has become of critical importance. As the potential of ADR in this sector becomes more and more internationally recognized, the use of arbitration and mediation, in particular, is being regarded as credible alternative to litigation, given the characteristics of the art industry and market. In fact, these disputes are multi-faceted and judges are entrusted with cases that require both legal and highly technical expertise. Preparing a judge on art world's specific issues requires the contribution of experts' testimony and necessarily more time to render informed and credible decisions. This proves to be especially true in transnational cases.

Under certain circumstances litigation may be entirely appropriate, for example when disputing parties may be uncooperative or one of the parties is recalcitrant. In other cases, parties resort to litigation when a legal precedent is sought. There are also cases in which a legal action has the sole purpose of bringing attention to a problem, hoping that other potential claimants may learn about it and come forward to bolster their case. Lastly, litigation puts pressure on galleries, auction houses or museums, which prefer not to be in the public eye over matters that put into question their scrupulousness or due diligence.

Therefore, although to a certain extent litigation might be considered a good fit for art disputes, in light of the option offered by the alternative dispute resolution (ADR) mechanisms, the question is - is ADR the best

fit?

ADR refers to a number of dispute resolution processes and techniques, used to come to a solution between disputing parties without recurring to litigation in the national courts, with their strongly adversarial atmosphere. Largely used in transnational disputes between States and between individual and States, especially in recent times, ADR has gained widespread acceptance among the general public and the legal professionals for domestic and international commercial disputes.

The rising popularity of ADR can be explained by a number of reasons, among which the perception that these systems typically imply reduced costs<sup>1</sup> and are generally faster. They are also helpful in terms of maintaining a degree of privacy compared to the public nature of court proceedings, along with the collaborative nature of ADR, which allows the parties to come to a better understanding of the other's position, thus preserving their future relationship. These processes are also less formal and more flexible than court proceedings; for example, parties have greater control over the selection of the individual or individuals who will decide their dispute.

The use of alternative dispute resolution methods has proven so effective in the international disputes arena that it is often recommended as a first step before resorting to arbitration or to the courts.

Over the last few years, a strong consensus has emerged in the field of art law, recognizing the benefits of ADR for the resolution of art disputes.<sup>2</sup> These disputes have particular features for which ADR methods may be more appropriate than traditional court litigation<sup>3</sup>, thus avoiding the expense and complexity of multi-jurisdictional litigation and the risk of inconsistent results.<sup>4</sup> Parties are provided with an international and neutral forum in which they are free to choose a

<sup>1</sup> IONESCU, M. *Alternative Dispute Resolution*. p. 155.

<sup>2</sup> GOETZ-CHARLIER, A. Resolving Art-Related Disputes Outside the Courtroom: A Reflective Analysis of the Procedural Aspects of ADR. *Chartered Institute of Arbitrators*, Issue 4, 2018. p. 274.

<sup>3</sup> BUNDLE, A.; THEURICH, S. Alternative Dispute Resolution and Art-Law: A New Research Project of the Geneva Art-Law Centre. *Journal of International Commercial Law and Technology*, v. 6, n. 1, 2011. p. 28.

<sup>4</sup> DEN HARTOG, S. *The Use of Alternative Dispute Resolution in Art Related Disputes*, *Kluwer Arbitration Blog*. 2015. Available at: <http://arbitrationblog.kluwerarbitration.com/2015/10/23/the-use-of-alternative-dispute-resolution-in-art-related-disputes/>.

neutral mediator, arbitrator or expert from a third-country, along with the applicable law and language of the procedure.<sup>5</sup>

By its very nature art disputes often require a specific knowledge of art, along with being familiar with the art world's dynamics, something that a national judge usually does not have.<sup>6</sup> Through ADR, parties can choose a mediator or an arbitrator with the necessary technical expertise to properly handle and, more importantly, understand the matter of art or cultural heritage at stake. The general feeling is that an expert in the art market or a cultural institution operating in the field, is the most appropriate subject to decide a case or to help the parties find common ground.<sup>7</sup> This would be particularly important in cases involving parties from different cultural backgrounds.<sup>8</sup>

ADR provides a more flexible forum than litigation, helping the consideration of the matter from the legal but also cultural and ethical perspectives.<sup>9</sup> By taking into account a considerable amount of interests, there is more space to negotiate a mutual gain and a possible agreement between the actors.<sup>10</sup> One of the most relevant perks of ADR is that it allows the parties to adopt mutually satisfactory solutions beyond the monetary remedies that are traditionally available in national courts<sup>11</sup>, finding creative solutions that parties may explore. For example, in art restitution disputes, the suggested solution through ADR might include the res-

titution of the cultural object accompanied by cultural collaboration initiatives.<sup>12</sup>

Along with the creation of innovative legal remedies specifically conceived for art disputes,<sup>13</sup> ADR's flexibility allows for the consideration and possible use of customary laws and protocols.<sup>14</sup> In cases where indigenous communities are involved, ADR can be the forum where customary practices can be incorporated in the proceedings. For instance, there can be space for an adapted procedure providing for a community consultation process or acknowledging certain cultural and spiritual concerns.<sup>15</sup>

A successful example of an inclusive and creative agreement was reached in 2007 by the Tasmanian Aboriginal Centre and the Natural History Museum of London.<sup>16</sup> Since the 1980s, the Tasmanian Aboriginal Centre had asked for the return of human remains held in the museum's collection, but their requests had been repeatedly refused. In November 2006, the museum had agreed to return the remains, but only after having the opportunity to conduct several invasive scientific tests, among which extractions of DNA, chemical analyses of the bones, scans and photographs of the bodies. However, the Tasmanians had protested because these examinations would violate the Aboriginal customary rights. In May 2007, in view of the lengthy trial and the mounting legal costs, the parties agreed to proceed by means of mediation. Each party appointed a mediator, who jointly tried to lead the parties to reach a common solution. On one hand, the museum pursued scientific interest; its representative believed the data collection and the preservation of genetic material was fundamen-

<sup>5</sup> THEURICH, S. Art and Cultural Heritage Dispute Resolution. *Wipo Magazine*, v. 4, 2009. Available at: [https://www.wipo.int/wipo\\_magazine/en/2009/04/article\\_0007.html](https://www.wipo.int/wipo_magazine/en/2009/04/article_0007.html).

<sup>6</sup> DEN HARTOG, S. *The Use of Alternative Dispute Resolution in Art Related Disputes*, *Kluwer Arbitration Blog*, 2015. Available at: <http://arbitrationblog.kluwerarbitration.com/2015/10/23/the-use-of-alternative-dispute-resolution-in-art-related-disputes/>.

<sup>7</sup> GOETZ-CHARLIER, A. Resolving Art-Related Disputes Outside the Courtroom: A Reflective Analysis of the Procedural Aspects of ADR. *Chartered Institute of Arbitrators*, Issue 4, 2018. p. 287.

<sup>8</sup> THEURICH, S. Art and Cultural Heritage Dispute Resolution. *Wipo Magazine*, v. 4, 2009. Available at: [https://www.wipo.int/wipo\\_magazine/en/2009/04/article\\_0007.html](https://www.wipo.int/wipo_magazine/en/2009/04/article_0007.html).

<sup>9</sup> GOETZ-CHARLIER, A. Resolving Art-Related Disputes Outside the Courtroom: A Reflective Analysis of the Procedural Aspects of ADR. *Chartered Institute of Arbitrators*, Issue 4, 2018. p. 277.

<sup>10</sup> TRIOSCHI, A. Art-Related Disputes and ADR Methods: A Good Fit? *Kluwer Arbitration Blog*, 2018. p. 1. Available at: <http://arbitrationblog.kluwerarbitration.com/2018/07/08/adr-art-cultural-heritage/>.

<sup>11</sup> DEN HARTOG, S. *The Use of Alternative Dispute Resolution in Art Related Disputes*, *Kluwer Arbitration Blog*, 2015. Available at: <http://arbitrationblog.kluwerarbitration.com/2015/10/23/the-use-of-alternative-dispute-resolution-in-art-related-disputes/>.

<sup>12</sup> DE NOVA, G. L'Arbitro e i Contratti dell'Arte. *Rivista dell'Arbitrato*, Anno 27, Fasc. 3, 2018. p. 594; BUNDLE, A.; THEURICH, S. Alternative Dispute Resolution and Art-Law: A New Research Project of the Geneva Art-Law Centre. *Journal of International Commercial Law and Technology*, v. 6, n. 1, 2011. p. 31.

<sup>13</sup> GOETZ-CHARLIER, A. Resolving Art-Related Disputes Outside the Courtroom: A Reflective Analysis of the Procedural Aspects of ADR. *Chartered Institute of Arbitrators*, Issue 4, 2018. p. 283.

<sup>14</sup> THEURICH, S. Art and Cultural Heritage Dispute Resolution. *Wipo Magazine*, v. 4, 2009. Available at: [https://www.wipo.int/wipo\\_magazine/en/2009/04/article\\_0007.html](https://www.wipo.int/wipo_magazine/en/2009/04/article_0007.html).

<sup>15</sup> THEURICH, S. Art and Cultural Heritage Dispute Resolution. *Wipo Magazine*, v. 4, 2009. Available at: [https://www.wipo.int/wipo\\_magazine/en/2009/04/article\\_0007.html](https://www.wipo.int/wipo_magazine/en/2009/04/article_0007.html).

<sup>16</sup> TRIOSCHI, A. Art-Related Disputes and ADR Methods: A Good Fit? *Kluwer Arbitration Blog*, 2018. p. 1. Available at: <http://arbitrationblog.kluwerarbitration.com/2018/07/08/adr-art-cultural-heritage/>.

tal for future research.<sup>17</sup> On the other hand, according to Tasmanian traditions, the Aboriginals wished for the remains to be preserved, without having any further physical interference and no future desecration of the bodies.

After twenty years from the first restitution claim, the mediator succeeded in convincing the parties to agree to a mutually acceptable compromise. The Aboriginals acknowledged the importance for the museum to retain the extracted DNA and the remains were finally returned to their homeland.<sup>18</sup>

On this basis, ADR methods help the parties to preserve the existing relationship between them, for two main reasons. As demonstrated by the case of the Tasmanian Aboriginal Centre, many agreements include provisions that encourage the continuation of the collaboration between parties. Other examples of alternative solutions include the provision of art works in lieu of monetary damages, the shared ownership of an art piece, or the use of long-term loans.<sup>19</sup>

ADR methods, not being grounded on an adversarial system, promote a more peaceful resolution of disputes,<sup>20</sup> creating a fertile ground for future collaborations between actors of a world where the professional relationships are based upon trust and personal connec-

tions.<sup>21</sup>

Moreover, In the art world, the possibility to keep the proceedings and the outcome (at least to a large extent) confidential, is also a major incentive to make recourse to ADR.<sup>22</sup> Confidentiality allows the parties to focus on the merits of the dispute, without being concerned of its public impact.

Still this point is not without shades. There are cases where parties crave for the publicity of a trial, for tactical reasons or simply out of principle and often the parties' privacy has to be balanced with other considerable public interests (*i.e.* cases of illicitly traded objects).<sup>23</sup> Lastly, one of the drawbacks of strict confidentiality is that it does not allow to see the extent to which decisions reached through ADR have enriched art law and art-related dispute resolution.<sup>24</sup> This type of information could be a useful tool to allow parties, mediator and arbitrators to seek guidance from previous settlement agreements or arbitral awards, illustrate the application of specific legal art-law provisions, the variety of possible, available solutions and inspire parties in their own dispute-resolution process.<sup>25</sup>

An important contribution to making this kind of information accessible has been made through the creation and development, since 2010, of the Geneva Art-Law Centre database, the ArThemis. This system provides case notes focusing on the settlement of art-related disputes through ADR methods. It endeavors to cover as many jurisdictions as possible, a wide variety of art-law cases and to undertake a thorough analysis of the collected cases. At present it is the only database currently available for this specific sector.<sup>26</sup>

<sup>17</sup> In a press release, the museum representative stated that the remains: "[...] represent a human population from a time when Tasmania was isolated from the rest of the world and this scientific information gathered from them could enable future generations to understand more about how their ancestors lived, where they came from and ultimately provide a fascinating chapter in the story of what it means to be a human.", Natural History Museum London Press Release, "Natural History Museum Offers and Alternative Dispute Resolution to the Tasmanian Aboriginal Centre", available at: <https://plone.unige.ch/art-adr/cases-affaires/17-tasmanian-human-remains-2013-tasmanian-aboriginal-centre-and-natural-history-museum-london/natural-history-museum-press-release-natural-history-museum-offers-an-alternative-dispute-resolution-to-the-tasmanian-aboriginal-centre-tac-2007/view>, 2007.

<sup>18</sup> BUNDLE, A.; CHECHI, A.; RENOLD, M. *Case 17 Tasmanian Human Remains- Tasmanian Aboriginal Centre and Natural History Museum London*, ArThemis, Art-Law Centre University of Geneva. 2012. Available at: <https://plone.unige.ch/art-adr/cases-affaires/17-tasmanian-human-remains-2013-tasmanian-aboriginal-centre-and-natural-history-museum-london>.

<sup>19</sup> TRIOSCHI, A. Art-Related Disputes and ADR Methods: A Good Fit? *Kluwer Arbitration Blog*. 2018. p. 2. Available at: <http://arbitrationblog.kluwerarbitration.com/2018/07/08/adr-art-cultural-heritage/>.

<sup>20</sup> GOETZ-CHARLIER, A. Resolving Art-Related Disputes Outside the Courtroom: A Reflective Analysis of the Procedural Aspects of ADR. *Chartered Institute of Arbitrators*, Issue 4, 2018. p. 283.

<sup>21</sup> THEURICH, S. Art and Cultural Heritage Dispute Resolution. *Wipo Magazine*, v. 4, 2009. Available at: [https://www.wipo.int/wipo\\_magazine/en/2009/04/article\\_0007.html](https://www.wipo.int/wipo_magazine/en/2009/04/article_0007.html).

<sup>22</sup> DEN HARTOG, S. *The Use of Alternative Dispute Resolution in Art Related Disputes*, *Kluwer Arbitration Blog*. 2015. Available at: <http://arbitrationblog.kluwerarbitration.com/2015/10/23/the-use-of-alternative-dispute-resolution-in-art-related-disputes/>.

<sup>23</sup> TRIOSCHI, A. Art-Related Disputes and ADR Methods: A Good Fit? *Kluwer Arbitration Blog*. 2018. p. 2. Available at: <http://arbitrationblog.kluwerarbitration.com/2018/07/08/adr-art-cultural-heritage/>.

<sup>24</sup> GOETZ-CHARLIER, A. Resolving Art-Related Disputes Outside the Courtroom: A Reflective Analysis of the Procedural Aspects of ADR. *Chartered Institute of Arbitrators*, Issue 4, 2018. p. 287.

<sup>25</sup> BUNDLE, A.; THEURICH, S. Alternative Dispute Resolution and Art-Law: A New Research Project of the Geneva Art-Law Centre. *Journal of International Commercial Law and Technology*, v. 6, n. 1, 2011. p.31.

<sup>26</sup> BUNDLE, A.; THEURICH, S. Alternative Dispute Resolution



Also in cases that involve the restitution of Nazi-looted art, the procedural hurdles that bar lawsuits and the shortcomings of court litigation have made ADR methods more appealing.<sup>27</sup> In this respect, it is useful to observe that governmental reflections on the resolution of issues relating to art looted during the Holocaust era have included considerations and references to ADR. In first instance, during the 1998 Holocaust Era Assets Conference, which resulted in the Washington Conference Principles on Nazi-Confiscated Art<sup>28</sup>, Principle 11 explicitly stated that States were encouraged to develop ADR mechanisms for the resolution of disputes in this area.<sup>29</sup> Again in 2009, at the Prague Holocaust Era Assets Conference, Principle 11 was reaffirmed in the so-called Terezin Declaration, stating that alternative processes and ADR mechanisms should be implemented to facilitate “just and fair solutions”.<sup>30</sup>

In relation to these particular disputes, litigation in court may be unsatisfactory both substantially and procedurally. In terms of procedure, one major difficulty might be the limitation period, viewed by defendants as one of the most effective weapons to bar claimants from seeking the recovery of their artworks.<sup>31</sup> On the contrary ADR methods provide the necessary flexibility for handling difficult cases like the Nazi-era art claims since they can facilitate consensual and mutually satis-

factory agreements<sup>32</sup>, taking into account ethical and moral principles, in addition to purely legal principles. By having recourse to ADR, the parties seek to achieve the above mentioned “just and fair solutions”, rather than the mere application of the law, limited to the restitution or rejection of the claim.

A good example of the use of ADR is the dispute over Egon Schiele’s “Portrait of Wally” between the heirs of Lea Bondi, an Austrian Jew, and the Leopold Museum.<sup>33</sup>

After over a decade of inconclusive litigation, eventually the case was settled through negotiation in 2010. The resolution of this case, ultimately through compensation, is an example of a non-traditional remedy offer-

and Art-Law: A New Research Project of the Geneva Art-Law Centre. *Journal of International Commercial Law and Technology*, v. 6, n. 1, 2011. p.32.

<sup>27</sup> RENOLD, M. *Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations*, Policy Department C: Citizen’s Rights and Constitutional Affairs, European Parliament, 2016. p. 35. See also RAMOS, A. Arte, guerra e o direito internacional privado: da espoliação nazista à convenção unidroit sobre a restituição de bens culturais. *Revista Jurídica*, v. 19, n. 431, 2015. p. 54.

<sup>28</sup> The Principles, which are not binding, can be found at <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art>.

<sup>29</sup> Principle 11 states “Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.”, BUNDLE A., THEURICH S., *Alternative Dispute Resolution and Art-Law: A New Research Project of the Geneva Art-Law Centre*, cit., 2011, p.32.

<sup>30</sup> The Terezin Declaration is available at: [https://wjro.org.il/cms/assets/uploads/2019/06/terezin\\_declaration.pdf](https://wjro.org.il/cms/assets/uploads/2019/06/terezin_declaration.pdf); BUNDLE, A.; THEURICH, S. *Alternative Dispute Resolution and Art-Law: A New Research Project of the Geneva Art-Law Centre*. *Journal of International Commercial Law and Technology*, v. 6, n. 1, 2011. p. 32.

<sup>31</sup> GOETZ-CHARLIER, A. Resolving Art-Related Disputes Outside the Courtroom: A Reflective Analysis of the Procedural Aspects of ADR. *Chartered Institute of Arbitrators*, Issue 4, 2018. p. 283.

<sup>32</sup> RENOLD, M. *Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations*, Policy Department C: Citizen’s Rights and Constitutional Affairs, European Parliament, 2016. p. 36.

<sup>33</sup> Mrs. Bondi was an Austrian Jew and owner of an art gallery in Vienna, in 1925 she had acquired the painting “Portrait of Wally” by Schiele himself. After the German troops had annexed Austria to Nazi Germany, her gallery was declared “non-aryan” and was subjected to confiscation. She had to sell the art gallery to Mr. Welz, a member of the National Socialist German Workers. After the United States Force occupied Austria, arresting Mr. Welz, the painting was mistakenly delivered to the Rieger heirs (Dr. Rieger was an Austrian Jew and collector whose paintings and drawings had been acquired by Mr. Welz as well). The Rieger heirs had eventually sold the artworks to the Österreichische Galerie Belvedere, a museum in Vienna. The “Portrait of Schiele” was included in the transaction. In 1953 Rudolf Leopold, a renowned art collector, came in contact with Mrs. Bondi and upon learning about the Schiele painting, he made a deal with the Belvedere to acquire it. The painting was eventually displayed in the Leopold Museum, of whom Mr. Leopold became the “Museological Director” for life. In 1997 the museum loaned and shipped a part of its Schiele collection, including the painting in question, to the Museum of Modern Art (MoMA), for a temporary exhibition in New York. The arrival of the painting to the United States represented the opportunity for the Bondi heirs to recover their property. Previously, Mrs. Bondi had never filed a formal claim for the recovery of her artwork because she thought that it would have been extremely difficult to recover her painting before an Austrian judge and against an Austrian citizen (Mr. Leopold), and she was probably discouraged by the significant financial requirements. Nonetheless she made some attempts, in particular she had asked Mr. Leopold (before he bought the painting himself) to arrange a meeting with the Belvedere to talk about the restitution of her painting, suggesting that she did, indeed, consider the artwork as part of her property. Keeping aside the legal technicalities discussed in court, it is important to note that from 1998 up until 2010, no consistent result was reached. See CONTEL, R.; SOLDAN, G.; CHECHI, A. *Case Portrait of Wally- United States and Estate of Lea Bondi and Leopold Museum*, *ArThemis, Art-Law Centre University of Geneva*. 2012. p. 2, available at: <https://plone.unige.ch/art-adr/cases-affaires/case-portrait-of-wally-2013-united-states-and-estate-of-lea-bondi-and-leopold-museum>.

red by ADR; in fact, in many Nazi-looted art cases, the heirs of the victims prefer to be compensated, rather than obtaining the restitution of the disputed object.<sup>34</sup>

Even in case of art-authentication disputes some remarkable benefits can be achieved by resorting to ADR. First, ADR allows the appointment of an expert for reaching a decision or a settlement. The parties can choose from a pool of art-based experts, with experience in the art world and authentication of art.<sup>35</sup> Secondly, the parties can benefit from the privacy of the proceedings, without having to condemn a work of art, independently from the final outcome, to the stain of alleged forgery.

An important consequence of the voluntary character of mediation and negotiation is that the success of the procedure cannot be guaranteed. In fact, the parties involved in an ADR procedure are not obliged to reach a final agreement. It is said that ADR proceedings are jointly “owned” by the parties, by the third-party neutral/s assisting them and the institution overseeing the process or issuing the procedural rules. While this aspect is generally viewed as an important advantage for the parties to an art-related disputes, in certain cases, perhaps, some limits to the parties’ “freedom” should be set, particularly in cases where private interests and the interests of the general public may collide.<sup>36</sup> A notable example is the disputes between the Government of India and the Norton Simon Foundation, which was eventually settled through negotiation.<sup>37</sup> This case was

one of the earliest settlements reached on the restitution of an important artwork between a nation and a museum, in a “win-win solution”. The Norton Simon Foundation recognized India’s ownership title to the Nataraja idol and, in exchange, India allowed the statue to remain in the Foundation’s possession for ten years. Additionally, the Government of India allowed the Foundation to acquire any other Indian art object, found outside the country, with full immunity of suit for a one-year period. This provision is the most critical, for it is arguable that the Government agreed to it because it was not aware of the extent of the illicit trade of art works at that time and underestimated the dangers that one-year immunity could have caused to the national cultural and religious heritage. In this case, although this is a viable solution from the private interests’ perspective, the public interest was largely sacrificed.<sup>38</sup>

## 2 Resorting to mediation as a first option

Mediation is a powerful but lenient dispute resolution process, that has become increasingly popular in the context of art-related disputes. In fact, it is one of the most successful and effective ways for the parties to achieve an amicable, satisfactory and confidential solution to an art or cultural property dispute.<sup>39</sup> This is not surprising since it is the only resolution process (along with negotiation) whereby the parties remain in control, not only of the outcome, but also of the way in which the outcome is obtained.

In general, mediation is defined as a private, informal and non-binding alternative dispute resolution process, where a neutral, third-party assists the parties in resolving the dispute.<sup>40</sup> It is a voluntary process, the

<sup>34</sup> The salient terms of the agreement provided that (a) the Leopold Museum would pay \$19 million dollars to the heirs, (b) the heirs would release claims to the painting and (c) the museum would permanently display signage next to the painting to state its true provenance. RENOLD, M. *Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations*, Policy Department C: Citizen’s Rights and Constitutional Affairs, European Parliament, 2016. p. 39.

<sup>35</sup> Authentication in Art Newsletter November 2014. Available at: <https://authenticationinart.org/pdf/newsletter/Authentication-in-Art-Newsletter-November-2014.pdf>.

<sup>36</sup> BOICOVA-WYNANTS, M. Mediation and Art: Is it a match made in heaven?, *Artlaw*. 2014. Available at: <https://artlaw.club/en/cases/a-brief-insight-into-the-rybolovlev-bouvier-legal-thriller>.

<sup>37</sup> The case revolved around the restitution of an ancient bronze statue of the Lord Shiva, that was removed from a temple in India in 1956, and ultimately sent to the United States with false export documents. In 1973, the Nataraja idol was sold by a New York dealer to the Norton Simon Foundation. In the same year, the Government of India sued the Foundation seeking the return of the sculpture. According to Indian law, the idol, which was installed in a special shrine, was worshipped and regarded as divine, and it was not a mere movable property. Nonetheless, the Indian Government decided to discontinue the lawsuit for one year, hoping to facilitate an amicable

settlement between the parties. In 1976, before the case came to trial, it was settled through negotiation. See CHECHI, A.; BANDLE, A.; RENOLD, M. *Case Nataraja Idol- India and the Norton Simon Foundation*, Platform *ArThemis*, Art-Law Centre, University of Geneva. 2011. Available at: <https://plone.unige.ch/art-adr/cases-affaires/nataraja-idol-2013-india-and-norton-simon-foundation-1>.

<sup>38</sup> BOICOVA-WYNANTS, M. Mediation and Art: Is it a match made in heaven?, *Artlaw*. 2014. Available at: <https://artlaw.club/en/cases/a-brief-insight-into-the-rybolovlev-bouvier-legal-thriller>.

<sup>39</sup> PROWDA, J. *Mediation of Arts Related Disputes*, Stropheus LLC. 2014. Available at: <https://stropheus.com/category/museum/>; CLARK, R. *Mediation in Art Law and Cultural Property Disputes*, *Slaughter and May*. 2012.

<sup>40</sup> PROWDA, J. *Mediation of Arts Related Disputes*, Stropheus LLC.

parties are not obliged to agree to anything and there are no penalties for failing to resolve their dispute. Just as parties are free to initiate mediation at any stage of litigation, they can also suspend it at any time and move to arbitration or to court litigation.

The parties can appoint their mediator and, especially in art-related disputes, this aspect is a crucial turning point: the mediator can have expertise in the specific legal area and subject matter of art or cultural heritage at issue.

As already mentioned, mediation can foster creative solutions. Like most ADR mechanisms, it allows for the consideration of all the interests revolving around a dispute. In particular, it identifies impasses and looks for ways to overcome them, in order to reach a settlement. The focus of the discussion is shifted away from the 'position'/'side' each party has taken and looks into their needs and objectives instead.

A great example of how mediation can be successfully applied is represented by the dispute arisen between Saint-Gall Canton and the Canton of Zurich<sup>41</sup>.

2014. Available at: <https://stropheus.com/category/museum/>. 2014.

<sup>41</sup> In 1712, during the religious wars that took place in Switzerland between the Catholic and the Reformed Cantons, a number of cultural objects, that previously belonged to the Abbey Library of Saint-Gall, was transferred to Zurich. In 1718, when the Cantons of Saint-Gall and Zurich signed a peace treaty, Zurich had agreed to return a great portion of the objects taken from the abbey, except for some 100 items, such as manuscripts, book, paintings, astronomical devices and the Prince-Abbot Bernhard Muller's cosmographical Globe. The story almost sank into oblivion, when, almost three centuries later, in 1996, a letter was published on a Saint-Gall journal, claiming the canton's rightful ownership to the cultural goods that had remained in Zurich. This raised an increasing public debate on whether these artifacts were to be returned or not, thus inducing the Cantonal Executive Council of Saint-Gall to start formal negotiations between the parties. In 1712, during the religious wars that took place in Switzerland between the Catholic and the Reformed Cantons, a number of cultural objects, that previously belonged to the Abbey Library of Saint-Gall, was transferred to Zurich. In 1718, when the Cantons of Saint-Gall and Zurich signed a peace treaty, Zurich had agreed to return a great portion of the objects taken from the abbey, except for some 100 items, such as manuscripts, book, paintings, astronomical devices and the Prince-Abbot Bernhard Muller's cosmographical Globe. The story almost sank into oblivion, when, almost three centuries later, in 1996, a letter was published on a Saint-Gall journal, claiming the canton's rightful ownership to the cultural goods that had remained in Zurich. This raised an increasing public debate on whether these artifacts were to be returned or not, thus inducing the Cantonal Executive Council of Saint-Gall to start formal negotiations between the parties. The Saint-Gall Canton's claim was based on legal grounds, asserting that the objects had never been validly acquired by Zurich, in view of

The parties had undertaken eight years of unsuccessful negotiations, the situation had become unbearable for both Cantons, until they conjointly requested the Confederation's intervention as a mediator in the dispute, as provided by the Swiss constitution of 1999.

Under the guidance of the mediation panel, assigned by the Swiss government, the parties were able to set aside their rigid legal positions and focus, instead, on their mutual interests.<sup>42</sup> A creative solution was negotiated and finally adopted by all the parties in 2006.<sup>43</sup>

In the end, the two Cantons were finally able to reach a mutually satisfactory compromise; they chose to share the benefits of the collection into combined ownership and proprietorship. In addition, the creation and funding of the expensive copy of the cosmographical Globe, symbolized Zurich's willingness to donate considerable time and money in order to effectively compensate Saint-Gall's loss.<sup>44</sup>

If the parties had stuck to their legal positions,

the applicable federal law on war, which prohibited the robbery of cultural goods. Zurich, in turn, claimed that the acquisition was legitimate under the international law at that time. Moreover, it argued that after signing the peace treaty, any claims had been forfeited or at least time-barred. CHECHI, A.; BANDLE, A.; RENOLD, M. *Case Ancient Manuscripts and Globe -Saint-Gall and Zurich, Platform ArThemis, Art-Law Centre, University of Geneva*. 2011. p. 2. Available at: <https://plone.unige.ch/art-adr/cases-affaires/ancient-manuscripts-and-globe-saint-gall-and-zurich>; BANDLE, A.; THEURICH, S. Alternative Dispute Resolution and Art-Law: A New Research Project of the Geneva Art-Law Centre. *Journal of International Commercial Law and Technology*, v. 6, n. 1, 2011. p. 35.

<sup>42</sup> CHECHI, A.; BANDLE, A.; RENOLD, M. *Case Ancient Manuscripts and Globe -Saint-Gall and Zurich, Platform ArThemis, Art-Law Centre, University of Geneva*. 2011. p. 3. Available at: <https://plone.unige.ch/art-adr/cases-affaires/ancient-manuscripts-and-globe-saint-gall-and-zurich>.

<sup>43</sup> The mediation agreement provided the following settlement: a) Saint-Gall accepted Zurich's ownership of the cultural objects, and, in return Zurich recognized the importance of the objects for Saint-Gall's cultural identity; b) Zurich offered Saint-Gall an unpaid and indefinite loan of 35 manuscripts, and Zurich agreed to lend the original cosmographical Globe to Saint-Gall to be exhibited for 4 months; c) Zurich approved the production of an exact replica of the globe at its own expenses and donated it to Saint-Gall. Any amendment or termination of the agreements could only be made after 38 years, by a joint request from the highest executive of each party. See CHECHI, A.; BANDLE, A.; RENOLD, M. *Case Ancient Manuscripts and Globe -Saint-Gall and Zurich, Platform ArThemis, Art-Law Centre, University of Geneva*. 2011. p. 4-5. Available at: <https://plone.unige.ch/art-adr/cases-affaires/ancient-manuscripts-and-globe-saint-gall-and-zurich>.

<sup>44</sup> BANDLE, A.; THEURICH, S. Alternative Dispute Resolution and Art-Law: A New Research Project of the Geneva Art-Law Centre. *Journal of International Commercial Law and Technology*, v. 6, n. 1, 2011. p. 35.



they could have only achieved a typical judicial “black or white” solution, instead, the process of mediation allowed the Cantons to opt for a solution that could benefit both.

On a more practical level, mediation can be far less expensive than litigation. Most mediation mechanisms require the parties to pay a little fee (due to the institution or mediation center), the mediator’s fee and sometimes a little more money when the parties agree to a settlement. It is not uncommon for the dispute to be resolved early, even in a single session, saving exorbitant sums in court costs, attorney’s fees and other related expenses.

Lastly, mediation is a confidential process. Like other ADR mechanisms, it avoids the upsetting experience of being exposed to a public proceeding or having one’s negative business decision exposed. In fact, it is less stressful and emotionally burdensome.

On the other hand, any statement, proposal, or offer made by the parties is not admissible as evidence in any subsequent arbitral or judicial proceeding. There is no public record of what was discussed during mediation sessions. All the records, reports or documents received by the mediator while serving in that capacity, as well as the mediator’s notes are private. This can be particularly advantageous where reputation and confidentiality are key, as it is in sensitive art and cultural property disputes.<sup>45</sup>

In conclusion, the parties can agree to settle or not and they are free to withdraw at any moment from the process and initiate proceeding, if a settlement appears impossible to achieve.<sup>46</sup>

### 3 The role of the mediator

In mediation a lot of emphasis is placed on the mediator’s role, usually held by one person only, or on occasion, by a panel of mediators.<sup>47</sup> Due to confidentiality requirements, it can be difficult to assess the con-

tribution made by the third party neutral in art-related cases, nonetheless its role is meant to be decisive.

Depending on the type of mediation that the parties require (either *facilitative* or *evaluative*<sup>48</sup>), the mediator may provide an objective assessment of the parties’ positions, advise them of the law, suggest settlement proposals, draft a settlement agreement or make observations as to its implementation. Hence, it can assume multiple roles, but it can be generally observed that the mediator, as an impartial outsider, is in a unique position to question the parties’ assumptions, perception and judgments, reducing the inflated expectations of the parties and provide them with some necessary realism.

“Reality-testing” is one of the most powerful techniques used in mediation, because it helps to overcome the barriers to an agreement, resulting from partisan perceptions and systematic overestimation of each side’s alternatives. This explains why mediators have to be appointed among independent individuals or institutions and it is fundamental that they remain impartial throughout the whole process.<sup>49</sup>

Mediation experts report that, in practice, when a dispute escalates, the opposing sides tend to develop negative opinions about each other. This phenomenon is called “reactive devaluation”.<sup>50</sup> What happens is that the parties will meet any suggestions coming from the other side with a great deal of skepticism. It follows that the parties will be more likely to trust the mediator’s proposal, rather than their counterparty’s arguments.

This is very likely what happened in the above mentioned dispute between the two Swiss Cantons.<sup>51</sup> Both parties had been stuck in unsuccessful negotiations for years, without managing to reach any solution. Each party was sticking to its unilateral position, unable to

<sup>45</sup> CLARK, R. *Mediation in Art Law and Cultural Property Disputes, Slaughter and May*. 2012. p.3.

<sup>46</sup> CLARK, R. *Mediation in Art Law and Cultural Property Disputes, Slaughter and May*. 2012. p.4.

<sup>47</sup> GOETZ-CHARLIER, A. Resolving Art-Related Disputes Outside the Courtroom: A Reflective Analysis of the Procedural Aspects of ADR. *Chartered Institute of Arbitrators*, Issue 4, 2018. p. 278.

<sup>48</sup> In facilitative mediation the mediator does not offer a solution to the problem, rather, it encourages the parties to come to a mutual agreement, helping them find common ground; in evaluative mediation the mediator suggests an agreement in order to promote the resolution of the dispute.

<sup>49</sup> CLARK, R. *Mediation in Art Law and Cultural Property Disputes, Slaughter and May*. 2012. p. 3.

<sup>50</sup> GOETZ-CHARLIER, A. Resolving Art-Related Disputes Outside the Courtroom: A Reflective Analysis of the Procedural Aspects of ADR. *Chartered Institute of Arbitrators*, Issue 4, 2018. p. 285.

<sup>51</sup> CHECHI, A.; BANDLE, A.; RENOLD, M. *Case Ancient Manuscripts and Globe -Saint-Gall and Zurich, Platform ArThemis, Art-Law Centre, University of Geneva*. 2011. Available at: <https://plone.unige.ch/art-adr/cases-affaires/ancient-manuscripts-and-globe-saint-gall-and-zurich>.

find common ground. Nonetheless, when the dispute was devolved to mediation, the panel guided them towards a mutually satisfactory settlement.

It is clear that a significant part of the mediation's success depends upon the mediator. The process relies upon its persuasive power, communication and facilitation skills, and capability to assist the parties to reach a mutual agreeable outcome.<sup>52</sup>

Unlike a judge, or an arbitrator, the mediator does not issue a decision or a judgement and has no authority to impose any binding decisions on the parties and the settlement can be binding only if the parties voluntarily accept it.

The parties will receive external assistance from the mediator to instill a dialogue, identify points of contention and maximize consensus, but they are free to halt the discussion at any time and walk away. The whole process depends on whether the parties are willing to find common ground and, even so, subsequently enforce the agreement reached.

The case between the Western Prelacy of the Armenian Apostolic Church of America and J. Paul Getty Museum, offers a good example of how, regardless of the mediator's efforts, the power to agree to the settlement remains within the parties' domain.<sup>53</sup>

The dispute concerned the restitution of the Canon Tables of the Zeyt'un Gospels. The Canon Tables were placed on sixteen pages, illustrated by T'oros Roslin, a celebrated Armenian artist. Sometime between 1915 and 1923, they were torn out from the ancient manuscript and illegally stolen.

In 1994, the Getty Museum purchased the Canon Tables. Upon learning, in 2010, that the stolen treasure was held in the museum, the Armenian Church filed a complaint before the Superior Court of California.<sup>54</sup>

<sup>52</sup> GOETZ-CHARLIER, A. Resolving Art-Related Disputes Outside the Courtroom: A Reflective Analysis of the Procedural Aspects of ADR. *Chartered Institute of Arbitrators*, Issue 4, 2018. p. 278.

<sup>53</sup> CHECHI, A.; BUNDLE, A.; RENOLD, M. *Canon Tables-Western Prelacy of the Armenian Apostolic Church of America and J. Paul Getty Museum, Platform ArThemis, Art-Law Centre, University of Geneva*. 2011. Available at: <https://plone.unige.ch/art-adr/cases-affaires/canon-tables-2013-western-prelacy-of-the-armenian-apostolic-church-of-america-and-j-paul-getty-museum>.

<sup>54</sup> CHECHI, A.; BUNDLE, A.; RENOLD, M. *Canon Tables-Western Prelacy of the Armenian Apostolic Church of America and J. Paul Getty Museum, Platform ArThemis, Art-Law Centre, University of Geneva*. 2011. p. 2. Available at: <https://plone.unige.ch/art-adr/cases-affaires/can>

In 2011, the Court ordered the parties to involve a mediator, but the mediation was not successful and the parties resorted to the court, but, before the proceeding had place, the case was eventually settled.

It is interesting to observe that, although the Western Prelacy and the Getty Museum had a fruitful mediation session in 2012, they did not reach a common agreement, proving that, above all, mediation is a human process which rests entirely on the parties' goodwill.<sup>55</sup>

## 4 The new focus of international mediation centres on art-related disputes

In the most recent years, many ADR institutions have developed a specific area of activity focused on art-related disputes. Some of the major ones will be briefly illustrated below.

### 4.1 WIPO-ICOM Art and Cultural Heritage Mediation project

It is worth mentioning that in light of the potential usefulness of ADR, the International Council of Museums (ICOM)<sup>56</sup>, and the World Intellectual Property Organization Arbitration and Mediation Center (WIPO Center), developed a special mediation process, especially designed to fit the needs of art and cultural heritage disputes. This mechanism was launched in 2011, thanks to the positive impulse given by the successful resolution of the Makonde Mask case.<sup>57</sup> After this posi-

on-tables-2013-western-prelacy-of-the-armenian-apostolic-church-of-america-and-j-paul-getty-museum.

<sup>55</sup> GOE GOETZ-CHARLIER, A. Resolving Art-Related Disputes Outside the Courtroom: A Reflective Analysis of the Procedural Aspects of ADR. *Chartered Institute of Arbitrators*, Issue 4, 2018. p. 278.

<sup>56</sup> Created in 1946, ICOM, is a non-governmental organization. It partners with other organizations, such as WIPO, to carry out its international public service missions, which include fighting illicit traffic in cultural goods and promoting risk management and emergency preparedness to protect world cultural heritage in the event of natural or man-made disasters.

<sup>57</sup> CHECHI, A. *The Settlement of International Cultural Heritage Disputes*. Oxford, 2014. p. 56. The Makonde Mask case arose between the United Republic of Tanzania and the Barbier-Mueller Museum of Geneva, Switzerland, regarding a typical "lipiko" mask, a wooden artifact worn during male initiation festivals by dancers up until the 1960s. In 1984, a Makonde Mask was stolen together with 16 other

tive experience, ICOM in cooperation with WIPO, established their mediation program in the art and cultural heritage field.<sup>58</sup> The mediation procedure is intended to cover disputes which include (but are not limited to) the return and restitution, loan and deposit, acquisition of art and cultural objects and intellectual property, involving public or private parties among whom States, museums, indigenous communities and individuals.

The process can be initiated with the parties' prior agreement, through a mediation clause inserted into the agreement or contract<sup>59</sup>, or with a subsequent agreement by signing the Recommended ICOM-WIPO Mediation Submission Agreement for Existing Dispute.<sup>60</sup>

One of the important benefits granted by this proce-

items during a break-in at the National Museum of Tanzania. The theft was reported to all the relevant, national and international authorities, including the Tanzanian police, INTERPOL and the International Council of Museums (ICOM). In 1990, Dr. Enrico Castelli, an Italian professor from University of Perugia, informed the Barbier-Mueller Museum that the Makonde Mask in its collection might have been one of those stolen artifacts. The Swiss museum immediately transmitted the information to ICOM, reporting that the object had been acquired in Paris, in 1985. Thereafter, the Swiss museum initiated the appropriate steps and proposals to facilitate a possible return of the mask to Tanzania. In particular, in 2002, it formally indicated the conditions under which it would transfer the ownership of the object. However, the parties were not able to reach a compromise over the issue of ownership of the object. In 2006, there was a setback. The negotiations were abruptly interrupted when Tanzania filed a request for the return of the Mask to the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or Restitution in case of Illicit Appropriation (ICPRCP), to which the Barbier-Mueller Museum reacted by filing a formal and official complaint against its counterparty with the Federal Office of Culture of Switzerland. Ultimately, the case had a positive ending, since in 2009 a governmental delegation of Tanzania met with representatives of the Swiss museum to conduct negotiations, which paved the way for resolution of the controversy. In fact, in 2010, the parties signed an agreement in order to donate the mask to the National Museum of Tanzania, under the aegis of ICOM. See Makonde Mask: Signing of an agreement for the donation of the Makonde Mask from the Barbier-Mueller Museum of Geneva to the National Museum of Tanzania, Press File, ICOM, 2014, p. 4 s.

<sup>58</sup> ICOM-WIPO Mediation Rules, available at: <https://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules/#8>.

<sup>59</sup> (a) The standard mediation clause recommended by the Center states that: "Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the ICOM-WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify place]".

<sup>60</sup> Available at: <https://www.wipo.int/amc/en/center/specific-sectors/art/icom/clauses/>.

cedure is the possibility for the parties to choose a mediator directly from the ICOM-WIPO list. The "Selection Commission" chooses the mediators among candidates that have sufficient skills in mediation and expertise in art and cultural heritage areas. Whenever the mediator believes that that case is not susceptible to resolution through this process, it may propose other methods, like an expert determination of one or more particular issues, or arbitration/expedited arbitration.<sup>61</sup>

## 4.2 Institutional Mediation with ADR Art & Cultural Heritage (ADR Arte) of the Milan Chamber of Arbitration

At the end of 2015, the Milan Chamber of Arbitration created the "ADR Art & Cultural Heritage Project (ADR Arte)", with the aim of offering the first Italian ADR service entirely devoted to art-related disputes, using mediation as the preferred method.<sup>62</sup>

The process can be activated through the procedure identified by the Italian mediation law<sup>63</sup>, or through the "Fast Track Mediation Rules" of the Milan Chamber.

A first informative meeting with a mediator has become a mandatory step before starting a lawsuit in civil and commercial disputes, regarding the following subjects: joint ownership, rights *in rem*, division, inheritance, family agreements, rents, loans, damages, press defamation, insurance, banking and financial contracts.

The Art and Cultural Heritage Mediation Center provides for: i) confidentiality of the procedure; ii) possibility to pick an impartial mediator with a specific art-expertise; iii) parties can be assisted by art professionals and linguistic translators of their choice; iv) parties can decide whether to invite their lawyers or not; v) the process is generally cheaper and faster for the cost of mediation is determined on the basis of the value of the dispute and the process, usually, terminates within 45 days.<sup>64</sup>

<sup>61</sup> WIPO Expedited Arbitration is a form of arbitration that is carried out in a shortened time frame and a reduced cost, available at: <https://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules/>.

<sup>62</sup> Art-related disputes, Milan Chamber of Arbitration, available at: <https://www.camera-arbitrale.it/en/mediation/art-related-disputes.php?id=526>.

<sup>63</sup> Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2010-03-04;281vig=>.

<sup>64</sup> The benefits of ADR Art and Cultural Heritage, Milan Chamber of Arbitration, available at: <https://www.camera-arbitrale.it/>

The Milan Center also provides “Fast Track Mediation Rules”, which are particularly flexible and can be adapted to the parties’ needs. This kind of procedure works well when the dispute is multidimensional, international and calls for the participation of art experts.<sup>65</sup>

The Milan Chamber of Arbitration provides statistics to verify the development of this service.<sup>66</sup> This information offers a unique insight to the overall response to this innovative service, but also into its effectiveness.<sup>67</sup>

From 2015, till December 31<sup>st</sup> of 2019, 73 art and cultural heritage mediations took place and the outcomes were the following: 21% reached an agreement; 44% failed to appear to the first session and only 10% could not reach an agreement.

Compared to the trends of the earlier years, from 2015 to 2017, the percentage of voluntary mediations increased by 60%, highlighting the growing interest of the art market’s professionals towards this means of disputes resolution and its results.

The percentage of agreements reached after the first session is stable compared to the 2015-2018 results, confirming the high rate of effectiveness. In particular, in 68% of cases the parties reached an agreement, leaving a 32% without agreement.

Lastly, and not surprisingly, 70% of the mediations were of non-contractual nature. In fact, written contracts art and cultural heritage contracts continue to be very rare.

#### 4.3 UNESCO’s Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP)

UNESCO offers a mediation program as well. Its basic purpose is to obtain the return of looted cultural property to its country of origin or its restitution in case of illicit appropriation. It goes without saying that cultural property constitutes a priceless asset for local, national and international communities alike. Under the auspices of UNESCO, Member States should cooperate actively in a spirit of mutual understanding and dialogue, to resolve issues of restitution of cultural property to the legitimate country.<sup>68</sup> The States – either parties or not to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property<sup>69</sup> – may utilize for appropriate intervention the Intergovernmental Committee for Promoting the Return of the Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP), created in 1978.<sup>70</sup>

The functions of the Committee have included seeking ways and means to facilitate bilateral negotiations for the restitution or return of cultural properties to the country of origin, also submitting proposals of mediation and conciliation to the parties in dispute. In

en/mediation/art-related-disputes/the-benefits-of-adr-art-cultural-heritage.php?id=661.

<sup>65</sup> Activation and Procedure, Milan Chamber of Arbitration, available at: <https://www.camera-arbitrale.it/en/mediation/art-related-disputes/activation-and-procedure.php?id=662>.

<sup>66</sup> ADR Art and Cultural Heritage Statistics, Milan Chamber of Arbitration, available at: <https://www.camera-arbitrale.it/en/mediation/art-related-disputes/adr-art-cultural-heritage-statistics.php?id=665>.

<sup>67</sup> MOREK, R. *The Art of Mediation and Mediation in Art Disputes*, *Kluwer Arbitration Blog*, 2018. Available at: <http://mediationblog.kluwerarbitration.com/2018/08/19/art-mediation-mediation-art-disputes/>.

<sup>68</sup> GEORGIU, I. *The role of UNESCO in cases of return of cultural property to their countries of origin*. The work of the UNESCO “Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, International Hellenic University, 2016. p. 6.

<sup>69</sup> The Convention was signed to address the increasing thefts in museums and archaeological sites, occurred at the end of 1960 and the beginning of the 1970s. To date, it has been ratified by 140 Member States of UNESCO. The convention requires the State Parties to take action in these main fields: (1) Preventive measures: inventories, export certificates, monitoring trade, imposition of penal or administrative sanctions, information and education campaigns, etc. (2) Restitution provisions: according to Article 7 (b) (ii) of the Convention, States Parties should undertake appropriate measures to seize and return any cultural property stolen and imported. (3) International cooperation framework: One of the guidelines of the 1970 Convention is the strengthening of international cooperation between States Parties. In cases where cultural patrimony is in jeopardy from pillage, Article 9 provides a possibility for more specific undertakings such as a call for export, import and international commerce controls.

<sup>70</sup> MOREK, R. *The Art of Mediation and Mediation in Art Disputes*, *Kluwer Arbitration Blog*, 2018. Available at: <http://mediationblog.kluwerarbitration.com/2018/08/19/art-mediation-mediation-art-disputes/>.



September 2010, the Committee reviewed and adopted the Rules of Procedure for Mediation and Conciliation.<sup>71</sup>

The requesting State, in the first instance, shall try to resolve the conflict through bilateral negotiations with the State in which the requested object is located. Only when such negotiations have failed or have been suspended, the case can be brought before the Committee.

According to Article 4 of the Rules of Procedure for Mediation and Conciliation<sup>72</sup>, only UNESCO Member States and Associate Members of UNESCO may resort to a mediation or conciliation procedure; however, the States may represent the interests of public or private institutions located on their territory or the interests of their nationals.

Every two years, each State is invited to nominate and submit the names of two individuals who may serve as mediators and conciliators. Their nomination depends upon their competence and experience in matters of restitution, dispute resolution and other specific patterns related to the protection of cultural property.

The procedure is intended to promote the harmonious and fair resolution of disputes concerning the restitution of cultural property. Its rules are conceived under the general principles of equity, impartiality and good faith.

## 5 Resorting to arbitration in art-related disputes.

On April 1<sup>st</sup>, 2019 a new arbitral institution became operative in The Hague, the first exclusively devoted to the resolution of art-related disputes.<sup>73</sup> The establishment of the Court of Arbitration for Art (CAfA) marked an unprecedented event in the art-business world, proving, once again, the predisposition of art disputes to be resolved through ADR and through arbitration in particular.

<sup>71</sup> Available at: [https://unesdoc.unesco.org/ark:/48223/pf0000192534\\_eng](https://unesdoc.unesco.org/ark:/48223/pf0000192534_eng).

<sup>72</sup> Available at: [https://unesdoc.unesco.org/ark:/48223/pf0000192534\\_eng](https://unesdoc.unesco.org/ark:/48223/pf0000192534_eng).

<sup>73</sup> The functioning of the CAfA-Court of Arbitration for Art and the list of arbitrators and experts is available at: <https://authenticationart.org/cafa/>.

In 2000 an internationally renowned expert of art and cultural property law once stated that “*Many problems in international trade might more easily be solved by arbitration tribunals than by state courts because arbitrators are extra national and can avoid cultural nationalism and because they are likely to have more expertise than judges of state courts*”,<sup>74</sup> thus underlining the potential of arbitration as an efficient method for the resolution of art-related disputes.

Arbitration is an adjudicative method within the ADR, where the parties agree – in writing – that all disputes arising out or in connection with the contract they entered into will be settled by an arbitral tribunal composed by a sole arbitrator or by a three-member panel, whose decision will be final and binding on the parties.

In addition to what has already been expressed in the previous paragraphs, in relation to the use of ADR and mediation in art-related disputes, some more specific considerations have to be made when referring to arbitration.

The arbitration agreement must be in writing. In the art market context, the written form is one of the main obstacles to a consistent use of arbitration: the art-business world operates according to its own, often tacit rules and it is largely based upon trust.<sup>75</sup> In fact, traditionally contracts are rarely concluded in writing and even when they are, they are not drafted with accuracy. Moreover, when art works are repeatedly sold and transferred to different owners, the ultimate buyer may not have concluded the original contract with the seller, or there might be a chain of sellers, therefore the parties can hardly count on a valid arbitration agreement.<sup>76</sup>

Similarly, the possibility of including an arbitration clause in the general conditions of contracts between

<sup>74</sup> The quote is of John Henry Merryman Resolution of Disputes in International Art Trade, Third Annual Conference of Venice Court of National and International Arbitration, Venice, Italy (29 and 30 September 2000) Conference Reports – quoted by NOOR, K. Arbitration in the art world and the Court of Arbitration for Art: Heading towards a more effective resolution of arts disputes?. *Art Antiquity & Law*, v. 24, n. 3, 2019. p. 3.

<sup>75</sup> NOOR, K. Arbitration in the art world and the Court of Arbitration for Art: Heading towards a more effective resolution of arts disputes?. *Art Antiquity & Law*, v. 24, n. 3, 2019. p. 3-4.

<sup>76</sup> NOOR, K. Arbitration in the art world and the Court of Arbitration for Art: Heading towards a more effective resolution of arts disputes?. *Art Antiquity & Law*, v. 24, n. 3, 2019. p. 3; DE NOVA, G. L'Arbitrato e i Contratti dell'Arte. *Rivista dell'Arbitrato*, Anno 27, Fasc. 3, 2018. p. 593. See also, Manual de importação e exportação de obras de arte, Associação Brasileira De Arte Contemporânea – Abact, São Paulo, 2013, p. 9.

auction houses and art galleries seems to be rather remote. In fact, it would be rather difficult to draft an appropriate and valid clause for a similar complex contractual framework, often involving multi-parties, where the auction house or gallery is frequently a mere intermediary and where bidding may be concluded on the phone followed by a subsequent international transfer of art works.<sup>77</sup>

Nonetheless, some parties are increasingly preferring to put proper paperwork in place, rather than operate, as in the past, on very informal agreements. Consignment agreements, sale terms and conditions, artist agreements, loan arrangements using art as collateral and financing agreements to enable art purchases are becoming more and more commonplace. All these documents could include proper arbitration clauses to validly express the parties' consent.<sup>78</sup>

As for mediation, another appealing aspect for choosing arbitration in the art sector is the possibility that the members of the arbitral tribunal might be selected, by the parties or the arbitral institution, among experts of the field and/or experienced arbitrators and possibly with a specific expertise in the subject matter of the dispute.<sup>79</sup> The possibility to appoint arbitrators who, not only have legal abilities, but also enough knowledge of art and of institutions, galleries or museums is a major incentive and lends credibility to the process.<sup>80</sup> This mix of competence is rarely found in court litigation.<sup>81</sup>

Also privacy and confidentiality of arbitral proceedings are fundamental features for managing disputes in this sector, with limited accessibility to information and control over the possibility to release information

about the case at stake.<sup>82</sup> This characteristic is highly appreciated in the art world, where there is a general wish for discretion and attempt to avoid negative or distasteful press.<sup>83</sup> Unfortunately confidentiality also translates into a limited amount of reported arbitrations in this field. On a different perspective, the threat of negative publicity and public exposure, generated by a court proceeding, sometimes puts just the right pressure on parties to settle.

Arbitration, like other ADR methods, is also remarkably flexible, faster than court litigation (at least in many jurisdictions) and could be reasonable in costs.

Lastly, one of the most important features of arbitration is that an award rendered by an arbitral tribunal is internationally enforceable through the 1958 New York Convention on Recognition and Enforcement of Foreign Awards.<sup>84</sup> As mentioned *supra*, unlike other ADR methods and similarly to a court judgement, the arbitral award is final and binding among the parties to the dispute. This means that when the award is not complied with voluntarily, the winning party can enforce it, either through the legal system of the State, in case of domestic awards or through the New York Convention, in case of foreign awards.<sup>85</sup> This aspect provides a significant incentive to the parties to use arbitration in an international art dispute, taking advantage of an effective system of enforceability of the arbitral decision.

One final aspect to take into consideration is that arbitration could also be combined with other forms of alternative dispute resolution, simply by inserting a

<sup>77</sup> BYRNE-SUTTON, Q. Arbitration and Mediation in Art-Related Disputes. *Arbitration International*, v. 14, Issue 4. 1998. Available at: <https://academic.oup.com/arbitration/article/14/4/447/216664>.

<sup>78</sup> POLYCARPOU, E. *Is arbitration the answer to settling disputes in the art world*, *Apollo- the International Art Magazine, Art Market*. 2018. Available at: <https://www.apollo-magazine.com/is-arbitration-the-answer-to-settling-disputes-in-the-art-world/>.

<sup>79</sup> GEGAS, E. International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property. *Ohio State Journal on Dispute Resolution*, v. 13, n. 1, 1997. p. 151

<sup>80</sup> NOOR, K. Arbitration in the art world and the Court of Arbitration for Art: Heading towards a more effective resolution of arts disputes?. *Art Antiquity & Law*, v. 24, n. 3, 2019. p. 7.

<sup>81</sup> NOOR, K. Arbitration in the art world and the Court of Arbitration for Art: Heading towards a more effective resolution of arts disputes?. *Art Antiquity & Law*, v. 24, n. 3, 2019, p. 6.

<sup>82</sup> COLE, T. *Legal Instruments and Practice of Arbitration in the EU*, Directorate-General for Internal Policies, Policy Department- Citizens' Rights and Constitutional Affairs. 2014. p. 20.

<sup>83</sup> NOOR, K. Arbitration in the art world and the Court of Arbitration for Art: Heading towards a more effective resolution of arts disputes?. *Art Antiquity & Law*, v. 24, n. 3, 2019. p. 5.

<sup>84</sup> The New York Convention is considered one of the most successful treaties in private international law. As of September 2019, the Convention has 161 state parties. The two basic actions contemplated by the Convention are (1) the recognition and enforcement of foreign arbitral awards- there is a general obligation for the Contracting States to recognize such awards and to enforce them in accordance with their rules of procedure. (2) Referral by a court to arbitration- the court of a Contracting State, when seized of a matter in respect of which the parties have made an arbitration agreement, must, if requested by one of the parties, refer them to arbitration (unless the agreement is invalid). Available at: <http://www.newyorkconvention.org/english>

<sup>85</sup> COLE, T. *Legal Instruments and Practice of Arbitration in the EU*, Directorate-General for Internal Policies, Policy Department- Citizens' Rights and Constitutional Affairs. 2014. p. 10.

multi-tier clause into the agreement, allowing the parties to proceed step by step with negotiation or mediation before resorting to arbitration, fostering a conciliatory environment in particularly sensitive cases.<sup>86</sup>

Maybe the world's most famous example of arbitration in the art world is the case arisen between Maria Altmann and the Republic of Austria for the recovery of six Gustav Klimt paintings, taken by the Nazis from her Jewish relatives, Ferdinand and Adele Bloch-Bauer.<sup>87</sup> The Bloch-Bauer family owned several paintings by Klimt; when Adele died, in 1925, in her will, she asked her husband to consider donating the paintings to the Austrian National Gallery.

In 1936, following the annexation of Austria to Nazi Germany, Ferdinand fled the country and his entire estate confiscated by the German authorities, while some of the paintings were donated to the Austrian National Gallery. When Ferdinand died in 1945, in his will, he did not mention the paintings, which to his knowledge, had been confiscated, but he included a clause according to which his wealth should be handed over to his nephew and nieces, among them Maria Altmann.

Only a year later, in 1946, the Austrian Government passed the Annulment Act, which was designated to annul all the transactions operated by the discriminatory Nazi ideology. The Bloch-Bauer heirs (at the time living in United States) obtained the restitution of most of their collection, but, according to the Act, the Jewish families that wanted to leave Austria were required to 'donate' valuable artworks, in favor of public museums in order to preserve national heritage. The Bloch-Bauer heirs' lawyers agreed to donate six paintings.

In 1998, after an Austrian journalist uncovered documents that proved that the National Gallery possessed looted art, the Austrian Government passed the Restitution Act, allowing for the restitution of art pieces that owners had been forced to donate in 1946. This

provision allowed Maria Altmann to formally request the restitution of the Klimt paintings: she did so first before the Austrian courts and then, later, in the U.S. jurisdiction.

In May 2005, scared by the prospect of a long and expensive litigation, the Austrian Republic eventually accepted to resort to arbitration<sup>88</sup>. The arbitral tribunal had to rule on the title of ownership of the Klimt paintings and determine whether the 1998 Restitution Act was applicable.

The arbitral tribunal ultimately found that the Austrian National Gallery had no valid ownership to the paintings. Thus, the Republic of Austria was under an obligation to return five Klimt paintings pursuant to the conditions of the Restitution Act.

The Altmann case attracted much attention on the subject of restitution of the Nazi-stolen property and, among various considerations, it shined a light upon the negative repercussions of litigating such profoundly moral and strategic cases before courts.<sup>89</sup> Considering the emotional attachment of the claimant to the paintings, as well as the emotional strain of the protracted procedure, the arbitral conclusion emphasized the necessity to increase awareness about the advantages of alternatives to litigation, also for the recovery of looted art.

Arbitration is particularly effective in disputes regarding the restitution of cultural properties to the country of origin.<sup>90</sup> Several international organizations have recognized that, not representing a national forum, an arbitration tribunal appears to be in a more neutral position than a national court, to pronounce itself on a State's claim, which, among others, involves assessing issues of sovereignty and national cultural policy and law.<sup>91</sup>

In this respect, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict provides that in case of dispute parties might

<sup>86</sup> GEGAS, E. International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property. *Ohio State Journal on Dispute Resolution*, v. 13, n. 1, 1997. p. 151.

<sup>87</sup> DE NOVA, G. L'Arbitrato e i Contratti dell'Arte. *Rivista dell'Arbitrato*, Anno 27, Fasc. 3, 2018. p. 595; RENOLD, C.; CHECHI, A.; BUNDLE, A. RENOLD, M. *Case Six Klimt Paintings- Maria Altmann and Austria*, Platform ArThemis, Art-Law Centre, University of Geneva. 2012. p. 1. available at: <https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria/CaseNoteSixKlimtpaintingsMariaAltmannandAustria.pdf>.

<sup>88</sup> Maria Altmann had already proposed arbitration, but the Austrian Government had always refused to accept it.

<sup>89</sup> BUNDLE, A.; THEURICH, S. Alternative Dispute Resolution and Art-Law: A New Research Project of the Geneva Art-Law Centre. *Journal of International Commercial Law and Technology*, v. 6, n. 1, 2011. p. 38.

<sup>90</sup> NEGRI CLEMENTI, G. Diritto dell'Arte. *l'arte, il diritto e il mercato*. v. 3, 2012. p. 222.

<sup>91</sup> NEGRI CLEMENTI, G. Diritto dell'Arte. *l'arte, il diritto e il mercato*. v. 3, 2012. p. 222; BYRNE-SUTTON, Q. Arbitration and Mediation in Art-Related Disputes. *Arbitration International*, v. 14, Issue 4. 1998. Available at: <https://academic.oup.com/arbitration/article/14/4/447/216664>.

resort to arbitration.<sup>92</sup> In 1995, representatives of over 70 States met in Rome and adopted the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, recognizing the claimant of a contracting State the option to choose – among other methods - arbitration to settle its dispute.<sup>93</sup>

Also, the EU Directive 2014/60/EU, adopted in 2014, on the return of cultural objects unlawfully removed from their territory of a Member State, provides for arbitration in case of disputes.<sup>94</sup> These examples clearly demonstrate the increasing role that arbitration has gained as an effective and neutral method for resolving art-related disputes.

In addition, it is worth mentioning some circumstances occurred in Italy which prove a growing acceptance of arbitration in art-related agreements. In the last two decades, the Italian Ministry of Cultural Properties and Activities (MIBACT) signed several agreements with foreign cultural institutions, that were holding illicitly excavated and exported cultural properties originating from Italy. Some of these agreements provide recourse to arbitration for the resolution of any potential dispute.<sup>95</sup>

Partnerships of this kind have been concluded by the Italian Ministry of Culture and (a) the Metropolitan Museum of Art of New York, in 2006, (b) the Museum of Fine Arts of Boston, in 2006, (c) the Princeton University Art Museum, in 2007, (d) the John Paul Getty Museum of Los Angeles, in 2007, (e) the Cleveland Museum of Art, in 2008, (f) the Tokyo Fuji Art Museum, in

2012 and (g) The Ny Carlsberg Glyptotek of Copenhagen, in 2016.

On one hand, they allow the State of origin to overcome the obstacles posed by the uncertain outcome of a litigation before a foreign court on the ownership of the claimed properties. On the other hand, they allow foreign museums to preserve their reputation, as truthful cultural institutions, that do not encourage the pillage of the cultural heritage of other countries and, instead, participate in the fight against the destruction of cultural contexts and the illegal traffic that results from it.

These agreements represent the outcome of an effective negotiation between the parties, obtaining mutually satisfactory deals<sup>96</sup>, along with provisions that aim at strengthening the relationship between the parties, through cooperative activities.<sup>97</sup>

While the text of most deals remains confidential, the one between the Ministry of Culture and the Commission for Cultural Properties of Sicily<sup>98</sup> and the Metropolitan Museum of New York has been made public. The agreement provided for the return of a number of archaeological items that had been illegally excavated in Italy and sold clandestinely in and outside the State.<sup>99</sup>

Among these objects, the most famous and valuable one was the Euphronios Krater, painted by the well-renowned Athenian artist, Euphronios. The vase was at the center of an international art crime investigation. It all began with a fatal car accident, in which, in an Italian antique dealer's pocket, were found the names of several people involved in the trafficking of illicitly excavated archaeological properties.

The Italian authorities focused their interest on Mr. Giacomo Medici, who was the owner of a warehouse, where over 3.000 antique artifacts were found. Almost

<sup>92</sup> Cf. Article 14, paragraph 6 : "If, within a period of six months from the date of receipt of the letter of objection, the Director-General has not received from the High Contracting Party lodging the objection a communication stating that it has been withdrawn, the High Contracting Party applying for registration may request arbitration in accordance with the procedure in the following paragraph.". Available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>93</sup> Article 8 paragraph 2 states that "The parties may agree to submit the dispute to any court or other competent authority or to arbitration" Available at: <https://www.unidroit.org/instruments/cultural-property/1995-convention>.

<sup>94</sup> Article 5, paragraph 6 provides: "[...] the competent authorities of the requested Member State may, without prejudice to Article 6, first facilitate the implementation of an arbitration procedure, in accordance with the national legislation of the requested Member State and provided that the requesting Member State and the possessor or holder give their formal approval". Available at: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32014L0060>.

<sup>95</sup> SCOVAZZI, T. *The Agreements between the Italian Ministry of Culture and American Museums on the Returns of Removed Cultural Properties, Cultural Heritage*. Scenarios 2015-2017. 2017. p. 119.

<sup>96</sup> TRIOSCHI, A. *Le ADR e la restituzione dei beni artistici illecitamente sottratti: il caso Repubblica Italiana contro Boston MFA*, Blog Mediazione, Camera Arbitrale di Milano. 2019. Available at: <https://blogmediazione.com/2019/03/08/le-adr-e-la-restituzione-dei-beni-artistici-illecitamente-sottratti-il-caso-repubblica-italiana-contro-boston-mfa/>.

<sup>97</sup> SCOVAZZI, T. *The Agreements between the Italian Ministry of Culture and American Museums on the Returns of Removed Cultural Properties, Cultural Heritage*. Scenarios 2015-2017. 2017. p. 120.

<sup>98</sup> Under the Italian Constitution, Sicily, with few other regions, has an autonomous title to exercise an exclusive competence on the cultural properties existing in the region.

<sup>99</sup> SCOVAZZI, T. *The Agreements between the Italian Ministry of Culture and American Museums on the Returns of Removed Cultural Properties, Cultural Heritage*. Scenarios 2015-2017. 2017. p. 122.



all of them had been illegally acquired. The most striking pieces of evidence, that confirmed the undeniable truth, were several polaroids found in his possession. Among them, one that showed the Krater when found in the clandestine excavation.<sup>100</sup>

Although the Met had purchased the precious vase, in 1972, for \$1.2 million, it agreed to relinquish ownership of the piece to Italy. In exchange, the Italian Ministry agreed to make four-year loans to the Museum of works of equal value and renouncing to claim the illegal excavation and export of the Krater.<sup>101</sup>

What is especially significant for the sake of the present study, is that an arbitration clause was inserted in the Agreement, providing that disputes on the interpretation or application of the agreement were to be settled amicably, or if the parties were unable to reach a mutually satisfactory resolution, “*in private arbitration by arbitration on the basis of the Rules of Arbitration and Conciliation of the International Chamber of Commerce, by three arbitrators appointed in accordance with said Rules*”<sup>102</sup>.

This unprecedented resolution to a decades-old international property dispute has fostered a new spirit of cooperation between museums and States, as shown by subsequent deals with other museums.<sup>103</sup>

In conclusion, the agreements between the Italian Ministry of Culture and the museums show an important change on the methods chosen for settling cultural property disputes, showing a clear preference for alternative means of dispute resolution, especially arbitration, as the means to reach equitable, faster and more satisfactory solutions.<sup>104</sup>

<sup>100</sup> SCOVAZZI, T. *The Agreements between the Italian Ministry of Culture and American Museums on the Returns of Removed Cultural Properties, Cultural Heritage. Scenarios 2015-2017*. 2017. p. 124.

<sup>101</sup> BRIGGS, A. Consequences of the Met-Italy Accord for the International Restitution of Cultural Property. *Chicago Journal of International Law*, v. 7, n. 2, Article 15, 2007. p. 623.

<sup>102</sup> According to Article 9, paragraphs 1 and 2, available at: [http://www.regione.sicilia.it/deliberegionta/file/giunta/allegati/Delibera\\_08\\_15.pdf](http://www.regione.sicilia.it/deliberegionta/file/giunta/allegati/Delibera_08_15.pdf).

<sup>103</sup> In 2007, Professor Briggs wrote: “This unprecedented resolution to a decades-old international property dispute has the potential to foster a new spirit of cooperation between museums and source nations, spawn stricter museum acquisition and loan policies, reduce the demand for illicit cultural property, and permanently alter the balance of power in the international cultural property debate”. BRIGGS, A. Consequences of the Met-Italy Accord for the International Restitution of Cultural Property. *Chicago Journal of International Law*, v. 7, n. 2, Article 15, 2007. p. 623.

<sup>104</sup> SCOVAZZI, T. *The Agreements between the Italian Ministry of Culture and American Museums on the Returns of Removed Cultural Properties,*

## 6 Arbitral institutions and the rules for settling art-related disputes.

Nowadays there are various national and international institutions that promote the use of arbitration as an instrument for the resolution of art-related disputes.

### 6.1 WIPO Arbitration Rules and WIPO Expedited Arbitration Rules

WIPO offers, not only mediation services, but also support for arbitral proceedings.<sup>105</sup> Considering that, to a large extent, the quality and effectiveness of the proceedings depend upon the quality of the third-party neutral - either mediator, arbitrator or expert - the Centre has created an open-ended Panel of individuals, from all around the world, selected for their special expertise in art and cultural heritage. The parties, under the WIPO Rules, are therefore invited to appoint arbitrators, mediators or experts from the provided list (but they can choose even outside the list).<sup>106</sup>

WIPO also provides for an Expedited Arbitration, carried out in a shortened time frame and at a reduced cost.<sup>107</sup> Within three months from the arrival of the answer to the request for arbitration, the proceeding should be closed and the arbitral tribunal will have one month to render the final award.

### 6.2 PCA Arbitration Rules

Also, the Permanent Court of Arbitration (PCA), the oldest global institution for the settlement of international disputes, has administered a number of disputes on matters of cultural property, among which the case between Eritrea and Ethiopia, brought forward by the Eritrea-Ethiopia Claims Commission, represents an interesting example.<sup>108</sup>

*Cultural Heritage. Scenarios 2015-2017*. 2017. p.126-127.

<sup>105</sup> Art and Cultural Heritage Dispute Resolution, WIPO Magazine, available at: [https://www.wipo.int/wipo\\_magazine/en/2009/04/article\\_0007.html](https://www.wipo.int/wipo_magazine/en/2009/04/article_0007.html), 2009.

<sup>106</sup> WIPO Alternative Dispute Resolution (ADR) for Art and Cultural Heritage, available at: <https://www.wipo.int/amc/en/center/specific-sectors/art/>.

<sup>107</sup> What is WIPO Expedited Arbitration?, available at: <https://www.wipo.int/amc/en/arbitration/what-is-exp-arb.html>.

<sup>108</sup> Between July 2001 and August 2001, Eritrea-Ethiopia Claims Commission (EECC) held several hearings on significant questions related to jurisdiction, procedure and possible remedies. In particu-

### 6.3 Venice Chamber of Arbitration – Regolamento degli arbitrati in materia di arte

At a domestic level it is worth mentioning the Venice Chamber of Arbitration, that in 2018 established a department entirely dedicated to resolution of national and international disputes related to art. The Chamber was established in 1990, under the aegis of the Chamber of Commerce of Venice. Revised Rules were launched in January 2020.

Parties to an art-related dispute may have recourse to arbitration submitting the Request to the Chamber. According to its Article 1(1) the Rules are intended to be applied to arbitral proceedings “whose object are art-related disputes – intended in its widest meaning, as any creative human activity, carried out individually or collectively or as business, in any whatsoever form, visual arts, music, theater, design, antiques and collectibles” [nonofficial translation].

The institution offers a highly technical proceeding, where specialized legal experts, conscious and aware of the distinctiveness of the art market, will settle the dispute in an expedite and confidential manner.<sup>109</sup>

lar, in October 2001, the Commission adopted its Rules of Procedure, based on the PCA's Optional Rules for Arbitrating Disputes Between Two States of 1992. By December 2001, the parties had filed their claims. One of Eritrea's main claims concerned the allegedly deliberate destruction, by the Ethiopian military, of the Stelae of Matara. The Stelae is an obelisk dating from the middle of the first millennium B.C. It is regarded as one of the most famous and historically significant archaeological sites in Eritrea. According to Eritrea, the soldiers had placed explosives at the base of the obelisk, in order to scatter it into pieces. The claimant State asked for monetary compensation for the suffered loss and damage, along with a request of an apology from the Government of Ethiopia. The EECC found that Ethiopia was, indeed, liable for the unlawful damage inflicted upon the State, but it dismissed the request for an apology. Instead, it stated that the appropriate remedy should be the monetary compensation, in the absence of any other appropriate remedy in accordance with international practice. DALY, B. *The Potential For Arbitration of Cultural Property Disputes: Recent Developments at the Permanent Court of Arbitration. Law and practice of International Courts and Tribunals*, v. 4, n. 2, 2005. p. 267-268. For the Eritrea-Ethiopia Claims Commission, see <https://pca-cpa.org/en/cases/71/>.

<sup>109</sup> Sezione Arte- Risolvi controversie nel mondo dell'arte, available at: <http://www.camera-arbitrale-venezia.com/?IdPagina=536>.

### 7 The CAfA and its arbitral procedure.

At a more international level, the Court of Arbitration for Art (CAfA) represents a very recent initiative. Established in 2018, thanks to a joint initiative of the Authentication in Art (AiA) Foundation<sup>110</sup> and the Netherlands Arbitration Institute (NAI), CAfA is the first arbitral institution entirely dedicated to art law disputes. It will promote use of arbitration and mediation to solve art conflicts, including claims concerning authenticity, provenance, ownership titles, contracts, intellectual property and trademark. The aim is to provide the parties with an efficient settlement mechanism, without resorting to national courts.<sup>111</sup>

The cases will be administered by the NAI with tribunals composed by arbitrators who are experienced lawyers, but, at the same time, familiar with issues specific to art disputes. For arbitral procedures in which technical issues arise (very common in authenticity and title disputes) the arbitral tribunal will be free to appoint its neutral experts.<sup>112</sup>

Initially, the working committee that set out the CAfA system was mainly focused on authenticity issues. In fact, some of the Court's most troubling decisions have been related to cases where the authenticity of an artwork had been put into question.<sup>113</sup> The Committee soon discovered that CAfA could deal with issues concerning a larger art market. The art market has its very peculiar features: it has very little regulation, it is not always transparent, and not necessarily rational. Moreover, in this business sector, contracts can be no longer than one single page, missing important details, thus making it more susceptible to a future dispute. In addition, ownership titles and issues of authenticity could

<sup>110</sup> The AiA foundation is an independent and non-profit organization, formed of leading art authenticators and whose objective is to promote best practices in art authentication.

<sup>111</sup> CASPAR-JOHNSON. *Court of Arbitration for Art. Columbia Journal of Transnational Law*, 2018.

<sup>112</sup> The recommended clause is the following: “All disputes, claims, controversies, and disagreements arising in connection with the present agreement, or further agreements resulting therefrom, shall be settled in accordance with the CAfA Arbitration Rules, consisting of the Arbitration Rules of the Netherlands Arbitration Institute supplemented and modified by the AiA/NAI Adjunct Arbitration Rules.”

<sup>113</sup> HAYDEN, M.; HECKER, S.; *Cheers: A New Court for Resolving Art Disputes*, Center for art law, Art Law Spotlight. 2019. Available at: <https://itsartlaw.org/2019/03/29/cheers-a-new-court-for-resolving-art-disputes/>.

generate an even more complex scenario. It is clear that the art market has its share of unique problems and disputes, that can be difficult to settle in a regular court of law, in a manner that the market will find acceptable.<sup>114</sup>

According to its founder, the art lawyer William Charron, the CAfA main goal is to produce accurate decisions that the art market will accept.<sup>115</sup> For this purpose, the CAfA has created a 'pool of experts' approved by the NAI. The arbitrators and experts will be selected exclusively from this list. In fact, in order to be credible and objective, the experts cannot work directly for the art market. It is important for the institution to guarantee the highest- standard of expertise, while at the same time remaining independent from the market, to avoid conflict of interests.<sup>116</sup>

Like most arbitrations, the proceedings will be conducted in private, as most of the times the parties to an art disputes prefer to keep their matters confidential and be as cost and time efficient as possible.<sup>117</sup>

As to the procedure<sup>118</sup>, according to Article 11 (6)<sup>119</sup>, parties are allowed to appoint arbitrators from the arbitrators list. However, in the event of compelling reasons, the administrator, after consultation with the CAfA Board, may appoint an arbitrator from outside the list. Still the presence of a pool of experienced arbitrators and experts is one of the defining features of CAfA. It is important to note that the quality of the

selected pool (of both arbitrators and experts) is what will guarantee the efficiency of the system in the eyes of the market. Moreover, the Rules provide that the chair of a three-arbitrator panel or the sole arbitrator must have "university legal training".

The CAfA provides for an arbitral tribunal composed by three members, unless the value of the relief sought is below € 1,500,000 (and there is need to limit expenses), or the parties have agreed to have a sole arbitrator (Article 12 (2)).<sup>120</sup>

Choosing the seat of the arbitration is a major factor especially in international cases and it allows the parties to select a place that is neutral, arbitration friendly, reputable and recognized, but the CAfA Rules do not allow the parties to choose the seat of arbitration, which shall always be The Hague (Article 21 (7)).<sup>121</sup> Nonetheless, according to Article 21 (8) the arbitral tribunal may hold hearings, deliberate and hear witnesses and experts in any place deemed appropriate, within or outside the Netherlands.

The role of experts is fundamental in art-related disputes, and the quality, appreciation and credibility of an expert makes the difference between what is accepted as genuine and what is deemed as a forgery. Although in most arbitrations the parties are free to submit their own experts, to a certain extent, this is not possible according to the CAfA Rules (Article 28 (7)).<sup>122</sup>; in fact, on the issues of forensic science and provenance, the tribunal alone is empowered to select the expert.<sup>123</sup> This could be explained by the need to reduce risks of relying upon the 'wrong expert', but it has the effect of reducing parties' autonomy in introducing their own expert evidence.<sup>124</sup>

<sup>114</sup> HAYDEN, M.; HECKER, S.; *Cheers: A New Court for Resolving Art Disputes*, Center for art law, Art Law Spotlight. 2019. Available at: <https://itsartlaw.org/2019/03/29/cheers-a-new-court-for-resolving-art-disputes/>.

<sup>115</sup> GILBERT, L. New tribunal aims to provide expertise and impartiality for art disputes. *The Art Newspaper, Lam*. 2018. Available at: <https://www.theartnewspaper.com/news/new-tribunal-aims-to-provide-expertise-and-impartiality-for-art-disputes>.

<sup>116</sup> HAYDEN, M.; HECKER, S.; *Cheers: A New Court for Resolving Art Disputes*, Center for art law, Art Law Spotlight. 2019. Available at: <https://itsartlaw.org/2019/03/29/cheers-a-new-court-for-resolving-art-disputes/>.

<sup>117</sup> GILBERT, L. New tribunal aims to provide expertise and impartiality for art disputes. *The Art Newspaper, Lam*. 2018. Available at: <https://www.theartnewspaper.com/news/new-tribunal-aims-to-provide-expertise-and-impartiality-for-art-disputes>.

<sup>118</sup> It is to be noted that there is also the possibility to activate summary arbitral proceedings.

<sup>119</sup> Article 11 (6): "Arbitrators shall be chosen from among those persons listed in the Arbitrator Pool. Only in the event of compelling reasons, the administrator in consultation with the CAfA Board, may appoint an arbitrator from outside the Arbitrator Pool. The administrator may also deviate from the requirement of the first sentence when employing the list procedure under Article 14 of the Rules."

<sup>120</sup> Article 12 (2): "The number of arbitrators shall be three, unless the monetary values of relief sought is less than 1,500,00 euros or the parties have agreed to one arbitrator."

<sup>121</sup> NOOR, K. Arbitration in the art world and the Court of Arbitration for Art: Heading towards a more effective resolution of arts disputes?. *Art Antiquity & Lam*, v. 24, n. 3, 2019. p. 11.

<sup>122</sup> Article 28 (7): "On issues of forensic science or the provenance of an art object, the only admissible expert evidence shall be from an expert or experts appointed by the arbitral tribunal. The arbitral tribunal may appoint such experts from within the Expert Pool. On all other issues, evidence from party-appointed experts shall be admissible. Expert evidence of a party-appointed expert on such other issues may not compete with or supplement the expert evidence from the arbitral tribunal-appointed expert on issues of forensic science or the provenance of an art object."

<sup>123</sup> NOOR, K. Arbitration in the art world and the Court of Arbitration for Art: Heading towards a more effective resolution of arts disputes?. *Art Antiquity & Lam*, v. 24, n. 3, 2019. p. 9.

<sup>124</sup> NOOR, K. Arbitration in the art world and the Court of Arbi-

The arbitral tribunal has to decide the case in accordance with the rules of law (Article 42 (1)). If the parties have not chosen the law governing the arbitration, the Rules state that the arbitral tribunal will decide the case in accordance with the rules which it considers appropriate (Article 42 (2)).<sup>125</sup> This provision is quite common to the rules of arbitration of other institutions, except for the fact that the Rules offer a presumption of the “appropriate law”, which may be for the arbitral tribunal, the law of the principal location of the seller, if known at the time of the transaction, or, if the principal location of the seller is unknown or cannot be determined or no sale is involved, of the current purported owner of the art object in question at the time of the commencement of the arbitration. The Rules contain an explicit reference to “any applicable trade usages” that the arbitral tribunal can take into account in its decision (Article 42 (4)).

On the other hand, Article 42(5) may prove controversial. It indicates that, unless differently agreed by the parties, the tribunal shall “respect applicable periods of limitation, prescription, and repose as well as similar time-bar principles when claims or defences have not been acted on within a reasonable time”, leaving to the tribunal the task to determine what “reasonable time” means. While the declared purpose is to protect the other party from a ‘stale’ claim, in practice it may end up barring meritorious claims, where victims have not pursued it with reasonable diligence for whatever reason or where evidence has been lost due to the passing of time.<sup>126</sup>

Evidence might be extremely important for defining art-related cases. The Rules provide that the arbitral tribunal is free to determine the rules of evidence, the admissibility of evidence, the division of the burden of proof and the assessment of evidence, unless the

parties have agreed in a different manner. With the consent of the parties, the arbitral tribunal may designate its chair to hear witnesses or experts or to conduct an on-site examination or viewing (Article 26). The IBA Rules on the Taking of Evidence in International Arbitration are also recalled as a guide for the arbitrators.

Considering the peculiarities of the field, the Rules also provide that on issues of forensic science or the provenance of an art object “the only admissible expert evidence shall be from an expert or experts appointed by the arbitral tribunal. The arbitral tribunal may appoint such experts from within the Expert Pool”, while on all other issues, evidence from party-appointed experts shall be admissible (Article 28). In addition, whenever an on-site inspection is needed, the arbitral tribunal may, at the request of one the parties or even on its own motion, examine a local situation or conduct a viewing on site. The arbitral tribunal shall give the parties the opportunity to be present (Article 30).

The Rules provide that it is the arbitral tribunal to determine the time-limit to render its award, which could be shorter if the parties decide not to hold a hearing. The arbitral tribunal can extend the time limit one or more times, on the general presumption that the dispute has to be settled expeditiously.

As to the need for transparency and consistency of decisions, the Rules provide for the award to be published anonymized, while the name of identity or the art object may be revealed (Article 51).<sup>127</sup> This provision might prove to be positive in relation to provenance of the artwork, but in most cases, it may negatively affect the work’s value in the future.<sup>128</sup> It will be interesting to see how this provision will play out in the future awards.

The binding character of the award upon the parties is affirmed with effect from the day on which the award is rendered and the parties are deemed to have accepted the obligation to comply with the award as soon as

tration for Art: Heading towards a more effective resolution of arts disputes?. *Art Antiquity & Law*, v. 24, n. 3, 2019. p. 9.

<sup>125</sup> Article 42 (2): If a choice of law has been made by the parties, the arbitral tribunal shall decide in accordance with the rules of law designated by the parties. Failing such designation of law, the arbitral tribunal shall decide in accordance with the rules of law which it considers appropriate. An appropriate choice of law for the arbitral tribunal may be the law of the principal location of the seller, if known at the time of the transaction, or, if the principal location of the seller is unknown or cannot be determined or no sale is involved, of the current purported owner of the art object in question at the time of the commencement of the arbitration.

<sup>126</sup> NOOR, K. Arbitration in the art world and the Court of Arbitration for Art: Heading towards a more effective resolution of arts disputes?. *Art Antiquity & Law*, v. 24, n. 3, 2019. p. 12.

<sup>127</sup> Article 51: The NAI shall be authorized to have the award published without stating the names of the parties and leaving out all other information that might reveal the parties’ identities, unless a party objects to such publication with the administrator within two months of the date of the award. The AiA shall be authorized to have the award published in the same manner. The name or identity of the art object in question may be revealed.

<sup>128</sup> PARSONS, J.; MOREL DE WESTGAVER, C. *A New Arbitral Institution for the Art World*. The Court of Arbitration For Art, Kluwer Arbitration Blog. 2018. Available at: <http://arbitrationblog.kluwer-arbitration.com/2018/06/17/a-new-arbitral-institution-for-the-art-world-the-court-of-arbitration-for-art/>. 2018.



possible by agreeing on CAfA arbitration or the NAI or according to the Rules of the NAI (Article 46).

## 8 Conclusions

By its very nature, art is inherently subjective, thus keen to disagreement.

Art law too, is a polymorphous branch of the law, that does not stand alone, but is the result of the amalgamation of other laws and concepts, that are invariably interrelated.<sup>129</sup>

Conflicts involving art object are equally multifaceted. A number of disputes may arise in relation to the pricing of an artwork, the attribution of a piece to the work of an artist, or quarrels between galleries and artists. Most of the times, there are not purely legal issues at stake, but also moral, cultural, historical, diplomatic and spiritual considerations to take into consideration. Even art-related legal issues are fairly complex because of the lack of uniform rules and most of the times, art disputes require highly legal and technical expertise that courts cannot offer. As a result, the outcomes have been mostly critical.

Over the last years, a strong consensus has emerged, recognizing the benefits of ADR methods for the resolution of art disputes. These methods have significantly improved, overall, more conscientious of the art world's necessities, providing the necessary flexibility to allow the consideration of non-legal factors and achieve fair and creative solutions, fostering win-win solutions, that fit well with the necessities of the art industry.

Thanks to the recent Court of Arbitration for Art (CAfA) in the Hague, a new light has been shined on the potential of arbitration in the field of art and cultural heritage. In fact, it could represent a middle ground between two opposites: on one hand, since the arbitral award is binding, it guarantees the finality that mediation does not provide. On the other hand, it affords the level of expertise, confidentiality, and flexibility that litigation does not offer.

Arbitration, where administered by a knowledgeable, dedicated and reputable institution, could address

these gaps and provide an ideal resolution method for art-related disputes.<sup>130</sup>

While the recent developments reflect the recognized potential of ADR, unfortunately, one of the major problems for its diffusion in the sector remains the still limited number of publicized cases in which art-related disputes have been resolved through ADR, to the general satisfaction of the parties involved. However, the increasing number of initiatives – at global level – to promote and support ADR as an effective method for the resolution of art-related controversies will certainly contribute to the cause.

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<sup>129</sup> NOOR, K. Arbitration in the art world and the Court of Arbitration for Art: Heading towards a more effective resolution of arts disputes?. *Art Antiquity & Law*, v. 24, n. 3, 2019.

<sup>130</sup> NOOR, K. Arbitration in the art world and the Court of Arbitration for Art: Heading towards a more effective resolution of arts disputes?. *Art Antiquity & Law*, v. 24, n. 3, 2019.p. 11 s.

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